Filed 7/8/19 Copenbarger v. Morris Cerullo World Evangelism CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LLOYD COPENBARGER, as Trustee, etc., Plaintiff and Appellant, v. MORRIS CERULLO WORLD EVANGELISM et al., Defendants and Appellants.	G055129 (Consol. with G055131) (Super. Ct. No. 30-2012-00605730) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed June 10, 2019, be modified as follows:

On page 15, after the first full paragraph, beginning with "MCWE and Plaza del Sol jointly made," insert the following heading and five paragraphs:

C. *Civil Code Section 1717, Subdivision (b)(2) Barred Plaza Del Sol from Recovering Attorney Fees for the Voluntarily Dismissed Causes of Action.*

Plaza del Sol argues it was entitled to recover attorney fees incurred in connection with the third and fourth causes of action because the Maag Trust voluntarily dismissed those causes of action. The third cause of action sought declaratory relief regarding the Agreement re: Assignment, and the fourth cause of action sought damages

for breach of the Agreement re: Assignment. The Maag Trust voluntarily dismissed the third and fourth causes of action without prejudice before trial.

Plaza del Sol contends it was entitled to recover attorney fees under Code of Civil Procedure section 1032, subdivision (b), which states a prevailing party is entitled to costs "as a matter of right," section 1032, subdivision (a)(4), which defines prevailing party to include "a defendant in whose favor a dismissal is entered," and section 1033.5, subdivision (a)(10), which identifies attorney fees when authorized by contract as a recoverable cost. The Agreement re: Assignment has a provision authorizing a prevailing party in any litigation over the agreement to recovery reasonable attorney fees. The Agreement re: Assignment defines a prevailing party as "the party who is determined in the preceding to have prevailed or who prevails by dismissal, default or otherwise."

However, Civil Code section 1717, subdivision (b)(2) (section 1717(b)(2)) bars recovery of attorney fees for dismissed contract causes of action. Section 1717(b)(2) states: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." In *Santisas v. Goodin* (1998) 17 Cal.4th 599, 613 (*Santisas*), the California Supreme Court held section 1717(b)(2) overrides conflicting contractual provisions. *Santisas* confirmed that in contract actions there is no separate contractual right to recover attorney fees that is not governed by Civil Code section 1717. (*Id.* at p. 616.) The Supreme Court explained: "[W]e construe subdivision (b)(2) of section 1717. . . as overriding or nullifying conflicting contractual provisions, such as provisions expressly allowing recovery of attorney fees in the event of voluntary dismissal or defining 'prevailing party' as including parties in whose favor a dismissal has been entered. When a plaintiff files a complaint containing causes of action within the scope of section 1717 (that is, causes of action sounding in contract and based on a contract containing an attorney fee provision), and the plaintiff thereafter voluntarily dismisses the action, section 1717 bars the

defendant from recovering attorney fees incurred in defending those causes of action, *even though the contract on its own terms authorizes recovery of those fees*." (*Id.* at p. 617; see *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 707 ["the definition of 'prevailing party' in Civil Code section 1717 is mandatory and cannot be altered or avoided by contract"].)

Thus, section 1717(b)(2) barred Plaza del Sol from recovering attorney fees incurred in connection with the third and fourth causes of action, both of which were contract claims. Section 1717(b)(2) overrode or nullified language in the Agreement re: Assignment defining prevailing party to include a party who prevailed by dismissal or allowing recovery of attorney fees for a voluntarily dismissed cause of action.

Plaza del Sol argues *Santisas* only prevents noncommercial actors from recovering attorney fees for voluntarily dismissed contract claims and should not prevent commercial actors, such as the Maag Trust and Plaza del Sol, from contracting around section 1717(b)(2). Plaza del Sol cites no authority interpreting section 1717(b)(2) in that way. The Supreme Court in *Santisas* drew no such distinction between commercial and noncommercial actors; the court's reasoning applies with equal force to both groups.

The modification does not change the judgment.

Appellants' petition for rehearing is denied.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

Filed 6/10/19 Copenbarger v. Morris Cerullo World Evangelism CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LLOYD COPENBARGER, as Trustee, etc., Plaintiff and Appellant, v. MORRIS CERULLO WORLD EVANGELISM et al., Defendants and Appellants.	G055129 (Consol. with G055131) (Super. Ct. No. 30-2012-00605730) O P I N I ON

Appeals from a postjudgment order of the Superior Court of Orange County, Deborah C. Servino, Judge. Case No. G055129 affirmed in part, reversed in part, and remanded with directions. Case No. G055131 dismissed as moot.

Galuppo & Blake, Louis A. Galuppo, Steven W. Blake and Daniel T. Watts for Defendants and Appellants.

Hall Griffin, George L. Hampton IV, Laura J. Petrie; HamptonHolley, George L. Hampton IV and Colin C. Holley for Plaintiff and Appellant.

* * *

INTRODUCTION

By postjudgment order, the trial court granted a motion for attorney fees brought by Lloyd Copenbarger, as Trustee of the Hazel I. Maag Trust (the Maag Trust) and denied a motion for attorney fees brought by Roger Artz and Lynn Hodge, as cotrustees of the Plaza del Sol Real Estate Trust (Plaza del Sol). Morris Cerullo World Evangelism, Inc. (MCWE) appeals, contending the trial court erred by awarding the Maag Trust attorney fees. Plaza del Sol also appeals, contending the court erred by denying its motion for attorney fees. The Maag Trust appeals too, contending the court erred by reducing its fees.

The primary question presented is which party—the Maag Trust, MCWE, Plaza del Sol, or none of them—was the prevailing party in an action "on a contract" within the meaning of Civil Code section 1717 (section 1717). The trial court found the Maag Trust was the prevailing party vis-à-vis MCWE and, as between the Maag Trust and Plaza del Sol, neither party prevailed.

As to MCWE and Plaza del Sol's appeal, we affirm in part, reverse in part, and remand with directions. We conclude the trial court did not abuse its discretion by finding that, as between the Maag Trust and Plaza del Sol, neither party prevailed and therefore affirm that part of the attorney fees order. After the trial court made its attorney fees order, we issued *Copenbarger v. Morris Cerullo World Evangelism* (2018) 29 Cal.App.5th 1 (*Copenbarger I*), which reversed the judgment in favor of the Maag Trust and directed entry of judgment in favor of MCWE. As a consequence, we conclude the portion of the attorney fees order awarding the Maag Trust attorney fees must be reversed and the matter remanded for the trial court to make a new determination of prevailing party status and, depending on that determination, award attorney fees. We express no opinion whether the Maag Trust, MCWE, or no party prevailed. In light of this disposition, we dismiss the Maag Trust's appeal as moot.

FACTS

We take the facts from our opinion in *Copenbarger I*:

"MCWE is the lessee of a 50-year ground lease (the Ground Lease) of real property (the Property) in Newport Beach. The Property was improved with an office building and marina (the Improvements). The Ground Lease terminates on December 1, 2018.

"In 2004, MCWE subleased the Property and sold all of the Improvements to NHOM (the Sublease). The Sublease terminates on November 18, 2018. Paul Copenbarger and Kent McNaughton were the members and managers of NHOM.

"To acquire the Sublease and fund the purchase of the Improvements, NHOM obtained a $1.15 million loan from Plaza del Sol . . . and a $3 million loan from the Maag Trust. Lloyd Copenbarger, who is Paul Copenbarger's brother, is the trustee of the Maag Trust. The $3 million loan from the Maag Trust was evidenced by a promissory note (the Maag Note) and secured by a first priority deed of trust on the Sublease and the Improvements (the Maag Deed of Trust). The $1.15 million loan from Plaza del Sol was evidenced by a promissory note (the Plaza del Sol Note) and secured by a second priority deed of trust on the Sublease and the Improvements (the Plaza del Sol Deed of Trust).

"Starting in 2009, NHOM experienced cash flow problems due to 'a shortage of rents.' . . . Necessary maintenance and repairs were not made . . . . In late August 2009, the Maag Trust notified NHOM of defaults of NHOM's obligations under the Maag Note, including failure to maintain the Property and to make timely loan payments.

". . . In April 2010, Cerullo, Plaza del Sol, and the Maag Trust entered into an 'Agreement re: Assignment and Transfer of Promissory Note and Deed of Trust and Ground Lease Enforcement' (the Agreement Re: Assignment). Under the terms of the Agreement Re: Assignment, the Maag Trust agreed to make certain payments on the

Plaza del Sol Note, reimburse Plaza del Sol for real property taxes it paid on the Improvements and the Property, and make future payments to Plaza del Sol in an amount equal to payments due on the Plaza del Sol Note as such payments became due. MCWE and Plaza del Sol agreed not to declare a default under the Sublease on account of then-existing defaults so long as the Maag Trust made the agreed-upon payments.

"In June 2011, MCWE commenced an unlawful detainer action against NHOM . . . (the UD Action), based on allegations NHOM failed to maintain and undertake required repairs to the Improvements. Six months later, the Maag Trust intervened in the UD Action as a party defendant under the theory that if NHOM were evicted and the Sublease terminated, then the Maag Trust's security interest created by the Maag Deed of Trust would be destroyed.

"In August 2012, MCWE, Plaza del Sol, and the Maag Trust entered into a settlement agreement (the Settlement Agreement). The Settlement Agreement 'rescind[ed] and cancel[ed] the Agreement Re: Assignment,' required the Maag Trust to pay $400,000 (split into two payments) to MCWE, and obligated Plaza del Sol to assign the Plaza del Sol Note and the Plaza del Sol Deed of Trust to the Maag Trust. The Settlement Agreement states . . . '[i]n any dispute involving the enforcement of this [Settlement] AGREEMENT, the prevailing party shall be entitled to recover . . . its reasonable attorneys' fees and all other reasonable costs and expenses incurred therein.'

"The Settlement Agreement states MCWE '[w]ill, and hereby does, dismiss the UD [Action] with prejudice.' . . . Although the Settlement Agreement was signed in August 2012, and required a dismissal with prejudice, MCWE did not dismiss the UD Action until October 2015, and then did so without prejudice." (*Copenbarger I, supra*, 29 Cal.App.5th at pp. 4-6.)

PROCEDURAL HISTORY

I.

Trial on the Complaint and Cross-complaint

"[T]he Maag Trust filed a complaint against MCWE and Plaza del Sol for declaratory relief and breach of contract. The complaint alleged MCWE and Plaza del Sol breached the Settlement Agreement by failing to dismiss the UD Action and by not delivering the Plaza del Sol Note and Plaza del Sol Deed of Trust to the Maag Trust." (*Copenbarger I, supra*, 29 Cal.App.5th at p. 6.) An amended complaint added two causes of action that were dismissed before trial.

MCWE and Plaza del Sol filed a cross-complaint for rescission of the Settlement Agreement. However, in 2015, MCWE and Plaza del Sol amended their cross-complaint to add causes of action for reformation and specific performance of the Settlement Agreement. MCWE then dismissed the UD Action, without prejudice. (*Copenbarger I, supra*, 29 Cal.App.5th at pp. 6-7.)

A bench trial was conducted in May 2016. The Maag Trust's theory of damages was it had incurred $118,000 in attorney fees defending the UD Action between August 2012, when the Settlement Agreement was executed, and November 2015, when MCWE dismissed the UD Action.

The trial court ruled in favor of the Maag Trust and against MCWE on the declaratory relief and the breach of contract causes of action and awarded the Maag Trust $118,000 in damages. The judgment awarded the Maag Trust $118,000 in damages against MCWE only, awarded judgment in favor of Plaza del Sol on the Maag Trust's first amended complaint, and awarded judgment in favor of the Maag Trust and against MCWE and Plaza del Sol on the cross-complaint.

In the statement of decision, the trial court found: (1) the Settlement Agreement was "valid, binding, and of full force and effect" and rejected MCWE's claim for its reformation; (2) MCWE materially breached the Settlement Agreement by "not

promptly dismissing with prejudice the UD [Action]"; (3) this breach excused further performance by the Maag Trust; and (4) the Maag Trust could recover attorney fees incurred in the UD Action as damages for breach of the Settlement Agreement. The court awarded the Maag Trust $118,000 in damages based on Lloyd Copenbarger's testimony that the Maag Trust had incurred that amount in defending the UD Action.

As to the cross-complaint, the trial court found, "MCWE fails to show that it is entitled to reformation of the Settlement Agreement." The court found: "The reformation that MCWE seeks . . . is not what the parties had agreed upon. Rather, MCWE seeks to create an entirely new settlement agreement, one to which Lloyd Copenbarger testified at trial that he would have never agreed [upon]." Because MCWE was not entitled to reformation of the Settlement Agreement, it was not entitled to specific performance of a reformed agreement.

II.

Motions for Attorney Fees

The Settlement Agreement has an attorney fees provision (section 8) stating: "In any dispute involving the enforcement of the AGREEMENT, the prevailing party shall be entitled to recover, in addition to all other remedies it may have, its reasonable attorneys' fees and all other reasonable costs and expenses incurred therein." After entry of judgment, the Maag Trust and Plaza del Sol each brought a motion for attorney fees based on section 8 of the Settlement Agreement. The Maag Trust sought $328,500 in attorney fees while Plaza del Sol sought $759,402 in attorney fees. The trial court denied two ex parte requests made by MCWE to obtain discovery from the Maag Trust on its attorney fees request.

The trial court denied Plaza del Sol's motion for attorney fees. The court found that, although Plaza del Sol was the prevailing party under Code of Civil Procedure section 1032, it was not the prevailing party for purposes of awarding attorney fees because Plaza del Sol did not prevail on its cross-claims for reformation and specific

performance. The trial court granted the Maag Trust's motion for attorney fees because the Maag Trust was "the prevailing party on the Settlement Agreement with respect to MCWE." The court reduced the amount of fees from $328,500 to $176,190 for "inefficiency, block[-]billed, vague, or unnecessary billing entries."

MCWE and Plaza del Sol filed a notice of appeal from the attorney fees order, and that appeal was docketed as case No. G055129. The Maag Trust also filed a notice of appeal from the attorney fees order, and that appeal was docketed as case No. G055131. We ordered the two appeals consolidated for all purposes,

DISCUSSION

I.

The Trial Court Did Not Err by Denying Plaza Del Sol's Motion for Attorney Fees.

Plaza del Sol argues the trial court erred by considering the cross-complaint in determining prevailing party status under section 1717 because the cross-complaint asserted the equitable claims for reformation and specific performance, which are not "on a contract." Plaza del Sol also argues it was entitled to recover costs and attorney fees because the Maag Trust failed to beat MCWE and Plaza del Sol's offer under Code of Civil Procedure section 998 (section 998).

A. *Plaza Del Sol Was Not the Prevailing Party Under Section 1717.*

1. *Background Law and Standard of Review*

Attorney fees, when authorized by contract, are allowable as costs. (Code Civ. Proc., § 1033.5, subd. (a)(10).) Code of Civil Procedure section 1021 leaves the "measure and mode of compensation" for attorney fees to the agreement of the parties. Section 1717 governs fee awards for enforcing contracts that include fee-shifting clauses. Section 1717, subdivision (a) awards attorney fees in "any action on a contract" to "the party who is determined to be the party prevailing on the contract, whether he or she is

the party specified in the contract or not." Section 1717, subdivision (b) (section 1717(b)) defines prevailing party as "the party who recovered a greater relief in the action on the contract."

"[T]o invoke section 1717 and its reciprocity principles a party must show (1) he or she was sued on a contract containing an attorney fee provision; (2) he or she prevailed on the contract claims; and (3) the opponent would have been entitled to recover attorney fees had the opponent prevailed." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.)

The trial court has discretion under section 1717 in making a prevailing party determination. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 (*Hsu*).) We will not reverse the trial court's determination of prevailing party status absent a manifest abuse of discretion, a prejudicial error of law, or necessary findings that are not supported by substantial evidence. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 239.)

2. *The Claims for Reformation and Specific Performance Were "on a Contract."*

The term "*on a contract*" must be construed liberally. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc., supra,* 211 Cal.App.4th at p. 239.) "The phrase 'action on a contract' includes not only a traditional action for damages for breach of a contract containing an attorney fees clause [citation], but also any other action that 'involves' a contract under which one of the parties would be entitled to recover attorney fees if it prevails in the action [citation]. 'In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action.'" (*Id*. at pp. 240-241.)

Plaza del Sol, by arguing the reformation claim was equitable and therefore not contractual, focuses on the remedy sought instead of the basis of the cause of action. Equitable claims can be "on a contract" no less than legal ones. (See *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347 ["Here, although the remedy sought in the

relevant causes of action was equitable, the claims were still actions 'on the contract,' i.e., the note and deed of trust"].) Thus, courts have held the phrase "action on a contract" as used in section 1717 includes an action seeking declaratory and injunctive relief to enforce a consent decree (*In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1601) and an action seeking declaratory and injunctive relief and quiet title based on violations of the terms of a promissory note and deed of trust (*Kachlon v. Markowitz, supra,* 168 Cal.App.4th at pp. 347-348).

More specifically, in *Wong v. Davidian* (1988) 206 Cal.App.3d 264, 270 the Court of Appeal concluded a cause of action for reformation was "on a contract" under section 1717 even though the plaintiff was not seeking to enforce the contract. Plaza del Sol went one step further in its cross-complaint and sought specific performance of the Settlement Agreement as reformed. It is hard to conceive of a cause of action that is more "on a contract" than specific performance of a contract. Yet, a decree of specific performance is very much an equitable remedy. (See 13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity, § 25, pp. 309-310.)

Plaza del Sol argues it sought no affirmative relief on a contract but asserted only equitable defenses. The cross-complaint alleged otherwise. Plaza del Sol and MCWE sought two forms of affirmative relief: reformation of the Settlement Agreement and specific performance of the reformed agreement. Thus, even if the cross-complaint could be viewed as purely defensive, the claims asserted in it would be on a contract within the meaning of section 1717.

3. *The Trial Court Did Not Err in Finding Neither the Maag Trust Nor Plaza Del Sol Prevailed.*

The party prevailing on the contract is the party who recovered "greater relief in the action on the contract." (§ 1717(b)(1).) "The court may also determine that there is no party prevailing on the contract for purposes of this section." (*Ibid.*) Section 1717(b)(1) thus gives the trial court discretion to determine no party has prevailed on the

contract. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109; *Hsu, supra*, 9 Cal.4th at pp. 871-876.)

When determining which party prevailed within the meaning of section 1717, the trial court "is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu, supra,* 9 Cal.4th at p. 876.) In determining litigation success, courts should respect substance rather than form, and may be guided by equitable considerations connected to litigation success. A party who is denied direct relief on a claim may nonetheless be a prevailing party if it is clear the party has otherwise achieved its main litigation objective. (*Id.* at p. 877.)

Plaza del Sol was the prevailing party on the Maag Trust's complaint; the Maag Trust was the prevailing party on MCWE and Plaza del Sol's cross-complaint. Neither the Maag Trust nor Plaza del Sol obtained affirmative relief from the other. A determination of no prevailing party is typically made in this situation, when both parties seek affirmative relief but neither gets it. (*Hsu, supra*, 9 Cal.4th at p. 875.)

Plaza del Sol contends the trial court erred by finding no prevailing party because the cross-complaint was compulsory and purely defensive. In so arguing, Plaza del Sol relies on the following passage from *Hsu*: "When there are cross-actions on a contract containing an attorney fees provision, and no relief is awarded in either action, a trial court is not obligated to find that there is no party prevailing on the contract for purposes of section 1717. If the court concludes that the defendant's cross-action against the plaintiff was essentially defensive in nature, it may properly find the defendant to be the party prevailing on the contract." (*Hsu, supra,* 9 Cal.4th at p. 875, fn. 10.)

We will assume that Plaza del Sol's cross-complaint was compulsory because it arose out of the same transaction or occurrence as the causes of action alleged

in the complaint. (Code. Civ. Proc., §§ 426.10, subd. (c), 426.30, subd. (a).) But the fact a claim is compulsory does not make it defensive or mean a party is compelled to bring it.

In addition, the trial court could reasonably have found that Plaza del Sol's cross-complaint was not defensive because it sought significant changes to the Settlement Agreement and specific performance of the reformed agreement. The changes to the Settlement Agreement sought by Plaza del Sol had significant monetary value. For instance, the reformation cause of action sought to alter the indemnification provision (paragraph 1(D)) of the Settlement Agreement to expand the scope of claims that NHOM agreed to indemnify. We can tell the value of this change to the indemnification provision from communications made in connection with the section 998 offer made by MCWE and Plaza del Sol. That offer included, as part of the terms of a proposed settlement, the modifications alleged in the cross-complaint. To clarify the meaning of the section 998 offer, counsel for MCWE and Plaza del Sol sent an e-mail to the Maag Trust's counsel stating MCWE "intended to make the indemnity provision broader," with the consequence that the Maag Trust would be liable for at least $359,000.

Plaza del Sol was not forced to bring the reformation and specific performance claims. Plaza del Sol could have stuck to its original strategy of seeking only to rescind the Settlement Agreement. By amending its cross-complaint to assert reformation and specific performance, Plaza del Sol but made a strategic decision to expand its litigation objectives to encompass affirmative relief.

The trial court here was not obliged to determine Plaza del Sol was the prevailing party even if it found the cross-complaint to be defensive. If the trial court finds a cross-claim is defensive, it "*may*" find the defendant to be the party prevailing on the contract. (*Hsu, supra*, 9 Cal.4th at p. 875 fn. 10, italics added.) By choosing the word "*may*," the Supreme Court indicated a trial court has discretion to find no prevailing party even if the defendant filed a defensive cross-complaint. (See *Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 368, italics added.)

B. *The Maag Trust Beat the Section 998 Offer.*

MCWE and Plaza del Sol made a joint section 998 offer.[1] The Maag Trust did not respond to that offer. Plaza del Sol argues it was entitled to recover postoffer costs and attorney fees because Plaza del Sol was "completely absolved of any liability" even though the Maag Trust beat the offer as to MCWE.

"[S]ection 998 establishes a procedure to shift costs if a party fails to accept a reasonable settlement offer before trial. The purpose of the statute is to encourage pretrial settlements. [Citation.] Section 998 provides that if a plaintiff fails to accept a written offer to compromise by a defendant and fails to obtain a more favorable judgment, the plaintiff cannot recover its postoffer costs and must pay the defendant's costs incurred after the offer." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764.) "A judgment is more favorable to the plaintiff than a prior settlement offer only if the value of the plaintiff's recovery in the judgment, exclusive of the plaintiff's postoffer costs, exceeds the value of the offer." (*Ibid.*)

MCWE and Plaza del Sol's joint section 998 offer had both monetary and nonmonetary components. The monetary component was payment of $100,000 by MCWE and Plaza del Sol to the Maag Trust and the stipulation that "[e]ach party shall bear its own attorney's fees and costs." The nonmonetary component had two parts. The first part was that all parties would agree to be bound by a Settlement Agreement reformed as set forth in the section 998 offer. The modifications proposed in the section 998 offered mirrored the allegations of the reformation cause of action in the cross-complaint. The second part was a mutual full release "of any and all past, present,

[1] In relevant part, section 998, subdivision (c)(1), provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer."

or future, claims against each other concerning or relating to the issues raised in the operative pleadings in this actions."

At trial, the Maag Trust recovered $118,000 in damages from MCWE and nothing from Plaza del Sol. The Maag Trust prevailed against MCWE and Plaza del Sol on the cross-complaint. In *Copenbarger I, supra,* 29 Cal.App.5th 1, we reversed the judgment in favor of the Maag Trust on its complaint and remanded with directions to the trial court to enter judgment in favor of MCWE and against the Maag Trust on its complaint. We stated, "this opinion becomes law of the case in further proceedings in this matter." (*Id.* at p. 17.)

Thus, in the wake of *Copenbarger I, supra,* 29 Cal.App.5th 1, the Maag Trust recovered nothing from MCWE or Plaza del Sol on the complaint but prevailed on the cross-complaint. That means the Maag Trust did not beat the monetary component of the section 998 offer. But what about the nonmonetary component?

"An offer to compromise under . . . section 998 must be sufficiently specific to allow the recipient to evaluate the worth of the offer and make a reasoned decision whether to accept the offer. [Citations.] Any nonmonetary terms or conditions must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer." (*Fassberg, supra,* 152 Cal.App.4th at p. 764 [in determining value of section 998 offer, court must consider value of release].) Thus, "[section 998] does not . . . authorize cost-shifting every time the *monetary* value of the damage award is less than the *monetary* 'term' of the defendants' statutory offer." (*Valentino v. Elliot Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 697.) However, if the nonmonetary components of the section 998 offer make the offer's overall value impossible to discern, then the offer is invalid for purposes of shifting costs. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 801 [value of public vindication in defamation case too subjective for determination of monetary worth]; *Valentino v. Elliot Sav-On Gas, Inc., supra,* 201 Cal.App.3d at pp. 698-699

[condition that plaintiff release causes of action not set forth in her complaint impossible to value].)

We can value the nonmonetary component of the section 998 offer here based on the e-mail clarification from MCWE and Plaza del Sol's counsel. "[W]here two sophisticated parties are represented by counsel, allowing an offer to compromise to be clarified in writing after the offer was made serves the purposes of section 998." (*Prince v. Invensure Ins. Brokers, Inc.* (2018) 23 Cal.App.5th 614, 623.) As we have explained, counsel stated in that e-mail MCWE "intended to make the indemnity provision broader," with the consequence that the Maag Trust would be liable for at least $359,000.

If the Maag Trust had accepted the section 998 offer, then MCWE and Plaza del Sol would have paid $100,000 while receiving nonmonetary benefits of at least $359,000. The value of the section 998 offer to MCWE and Plaza del Sol therefore was $259,000. By defeating the cross-claims for reformation and specific performance, the Maag Trust obtained a recovery worth $359,000 and a judgment more favorable than the $259,000 value of the section 998 offer.

Even if the nonmonetary value of the section 998 offer redounded solely to the benefit of MCWE, the Maag Trust still beat the offer as to Plaza del Sol. When, as here, defendants make a joint section 998 offer, the relevant comparison for section 998 is between the offer and the recovery obtained against that entire group of defendants. (*Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, 242 (*Kahn*); *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1171.) "That is, if two or more defendants jointly make an offer to settle, the reasonableness of that offer cannot be determined by comparing the judgment entered against fewer than all of the offering defendants. Instead, the offer must be compared to the judgment (or judgments) obtained against *all* defendants." (*Kahn, supra,* 240 Cal.App.4th at p. 242.)

Plaza del Sol relies on *Winston Square Homeowner's Assn. v. Centex West, Inc.* (1989) 213 Cal.App.3d 282, 294, which takes a contrary position. In that case, the

court accepted the "prevailing party approach" by which an offering party who submits a joint section 998 offer may recover so long as that party has absolutely prevailed against the offeree without regard to recovery against the other offerors. (*Winston Square Homeowner's Assn. v. Centex West, Inc.*, *supra*, at p. 294.) But we agree with the Court of Appeal in *Kahn* that the comparison approach is more consistent with the policies section 998 seeks to further. (*Kahn*, *supra*, 240 Cal.App.4th at pp. 242-244.)

MCWE and Plaza del Sol jointly made a section 998 offer. Thus, the relevant comparison here is between the Maag Trust's recovery against both MCWE and Plaza Sol, and the value of the section 998 offer. As we have explained, by defeating the cross-claims (asserted jointly by MCWE and Plaza del Sol) the Maag Trust obtained a recovery worth more than the value of the section 998 offer.

II.

In Light of *Copenbarger I,* We Remand for a Determination of Prevailing Party Status.

The trial court found the Maag Trust was the prevailing party vis-à-vis MCWE and granted the Maag Trust's motion for attorney fees. The trial court's finding the Maag Trust was the prevailing party was based on the judgment by which the Maag Trust recovered $118,000 in damages against MCWE. In *Copenbarger I, supra*, 29 Cal.App.5th at page 17, we reversed the judgment in favor of the Maag Trust on the Maag Trust's complaint, and directed entry of judgment in favor of MCWE.

Our decision in *Copenbarger I* removed a major premise for the trial court's determination that the Maag Trust was the prevailing party under section 1717. We invited the parties to submit supplemental briefs addressing the effect of *Copenbarger I* on the issues presented in this appeal. MCWE argues in its supplemental brief that the Maag Trust, no longer having the $118,000 judgment, is not the prevailing party and that MCWE, "[a]s the prevailing [party] on all contract claims," is entitled to recover its attorney fees. The Maag Trust argues in its supplemental brief that

Copenbarger I "affects the heart of the issues" presented and therefore the "[a]ppeals should be vacated as moot and the matter remanded back to the trial court for determination of prevailing party as between [the] Maag Trust and [MCWE]."

We conclude the correct course of action in light of *Copenbarger I* is to reverse the order granting the Maag Trust attorney fees and remand to the trial court to redetermine prevailing party status.[2] We disagree with MCWE that reversal of the money judgment in favor of the Maag Trust makes MCWE the prevailing party within the meaning of section 1717(b). (See *Marina Pacifica Homeowners Assn. v. Southern California Finance Corp.* (2018) 20 Cal.App.5th 191, 205 ["a party's failure to obtain its preferred litigation objective . . . does not mean that the other party is ipso facto the prevailing party"].) We explained in part I.A.3 of the Discussion section, the Maag Trust prevailed on MCWE and Plaza del Sol's cross-complaint, which asserted reformation and specific performance causes of action having significant monetary value. The cross-complaint was not purely defensive but, even if it were, that would not be dispositive of prevailing party status.

"If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc., supra*, 20 Cal.4th at p. 1109.) Given that the Maag Trust prevailed on the cross-complaint, it cannot be determined as a matter law whether the Maag Trust or MCWE—or neither—recovered "greater relief in the action on the contract." (§ 1717(b)(1).) It is therefore up to the trial court on remand to compare the results achieved by each party, exercise its discretion to make the determination of prevailing party status and, depending on that determination, award attorney fees.

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[2] Our decision in *Copenbarger I* has no effect on the trial court's determination that, as between the Maag Trust and Plaza del Sol, no party prevailed.

Because we are reversing the order granting the Maag Trust's attorney fees motion, we do not address MCWE's assertion the trial court erred by denying MCWE's requests for discovery on that motion.

We disagree with the Maag Trust that we should vacate both appeals as moot. An appeal is moot when any ruling by the appellate court can have no practical impact or provide the parties effective relief. (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1354.) Our decision in *Copenbarger I* does not render MCWE's appeal moot because we can still grant effective relief by reversing the attorney fees order and remanding for redetermination of prevailing party status.

However, reversal of the order awarding the Maag Trust attorney fees does render moot the Maag Trust's appeal. Because we are reversing the order awarding attorney fees, any ruling we might make regarding the amount of fees awarded would have no practical impact. (Cf. *Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1307 [reversal of judgment renders moot appeal of postjudgment order awarding attorney fees].) The remedy for mootness is not to vacate the appeal, but to dismiss it. "An appeal will be dismissed where the issues have become moot." (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist., supra,* 209 Cal.App.4th at p. 1354.)

DISPOSITION

In case No. G055129, the attorney fees order is affirmed with respect to Plaza del Sol, and in all other respects is reversed and remanded to the trial court with directions to redetermine prevailing party status, and, depending on that determination,

award attorney fees. Case No. G055131 is dismissed as moot. MCWE only may recover its costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.